

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ALLYSON HENRY,

Plaintiff,

v.

IAC/INTERACTIVE GROUP and EXPEDIA,  
INC.,

Defendants.

CASE NO. C05-1510RSM

ORDER GRANTING MOTION  
FOR PRELIMINARY  
INJUNCTION

**INTRODUCTION**

This matter comes before the Court on defendants' motion for preliminary injunction. (#67). Defendants argue that a preliminary injunction is necessary in this case because it will put the parties at the last uncontested *status quo* in regard to the disputed property, they are likely to succeed on their counterclaims, and they suffer continuous harm every day that their property is not in their exclusive control. Defendants also assert that this will have no irreversible effects on plaintiff because Blank Law & Technology, the forensic firm, maintains complete images of all property in its original condition which can be returned to plaintiff in the event that defendants lose this issue at trial.

Plaintiff responds that defendants have failed to meet the standard for a preliminary injunction. Plaintiff also argues that defendants' status quo argument is without merit because they allowed plaintiff access to the documents while she was on leave, defendants do not have



1 “clean hands,” and the balance of hardships tips in her favor. Finally, plaintiff argues that the  
2 Court should require a bond of \$200,000 if injunctive relief is granted.

3 For the reasons set forth below, the Court disagrees with plaintiff, and GRANTS  
4 defendants’ motion for a preliminary injunction.

### 5 **DISCUSSION**

#### 6 **A. Background**

7 Defendant Expedia is a Washington State corporation with its headquarters in Bellevue,  
8 WA. It provides online travel services for individuals and small businesses. Defendant  
9 IAC/InterActiveCorp (“IAC”) owns Expedia.

10 Expedia was originally the travel division of Microsoft. In 1999, Microsoft turned  
11 Expedia into an independent privately held company, retaining a majority interest. In 2002,  
12 Microsoft sold its interest to IAC. In 2003, IAC acquired the remaining interest. In 2005, IAC  
13 launched Expedia into a separate, publicly-traded company. As part of that launch, IAC moved  
14 all of its other travel-related services, i.e., Hotels.com and Hotwire, into the new Expedia.

15 Plaintiff Allyson Henry is an African-American woman, and a former Expedia employee.  
16 She began working for the company in 1995 while it was still the travel division of Microsoft.  
17 At some point in 2001, Ms. Henry was promoted to Vice President of International Product  
18 Development, as which she led a team of approximately 60 developers in providing the technical  
19 platform for all of IAC/Expedia’s international products.

20 At some point after 2001, plaintiff came under the supervision of a Simon Breakwell,  
21 IAC/Expedia’s manager for international business. Plaintiff believes that Mr. Breakwell was  
22 uncomfortable with a black, female manager, and did not support her in her employment  
23 position. She asserts that because of Mr. Breakwell’s bias, defendants no longer supported her  
24 job growth and no longer moved her along the promotion track she had previously been part of,  
25 despite the fact that she continued to obtain exemplary results in her division. During the same  
26 time period, she noted that white male managers with lesser or comparable qualifications were



1 promoted.

2 Plaintiff made complaints of discrimination internally to her managers and to the human  
3 resources department. However, she alleges that her complaints were completely ignored. In  
4 November of 2003, defendants informed plaintiff that she would be removed from her position  
5 as Vice President of International Product Development, and would be allowed to transfer to  
6 another open position within IAC or Expedia if she could identify one. Defendants gave plaintiff  
7 a paid leave of absence from November of 2003 until November 18, 2004, to seek another  
8 position inside or outside Expedia.

9 Plaintiff took her Expedia-issued laptop computer to her residence when she took her  
10 leave of absence. She continued to receive e-mail communication via the Expedia e-mail server,  
11 as well as e-mail via a personal e-mail account. She also maintained a connection to the Expedia  
12 computer server, with access to network documents, for at least some part of her leave of  
13 absence.

14 In July of 2004, plaintiff apparently retained Ms. Barnard, her current counsel, of  
15 Schwerin Campbell Barnard LLP. At that time, plaintiff relayed information to Ms. Barnard  
16 pertaining to her discrimination claims, including providing copies of some Expedia e-mail and  
17 documents. Counsel avows that plaintiff took precautions at that time not to disclose  
18 information that she possessed that was attorney-client privileged or work product protected as  
19 to defendants.

20 Also during her leave of absence, plaintiff continued to complain to defendants that she  
21 had been removed from her position for discriminatory reasons. On or about October 26, 2004,  
22 she met with Expedia's CEO to discuss the alleged discrimination. He apparently referred  
23 plaintiff's complaints to legal counsel. As a result, plaintiff received a letter retroactively  
24 terminating her employment as of October 1, 2004. Plaintiff was also ordered to have no further  
25 contact with defendants, unless it was through their legal counsel. After plaintiff noted that she  
26 was still on defendants' payroll, and had been paid after October 1, 2004, defendants withdrew



1 the retroactive termination, and made the termination effective November 19, 2004. Defendants  
2 did not use an exit process and did not request her to return her Expedia-issued laptop  
3 computer.

4 On March 11, 2005, plaintiff filed a discrimination law suit against defendants in King  
5 County Superior Court. Defendants subsequently removed the case to this Court.

6 On May 4, 2005, plaintiff's counsel apparently orally disclosed to defendants that she had  
7 a large volume of Expedia e-mail on multiple computers, and that she planned to review and  
8 produce them. She apparently again discussed the computers and documents on June 22 and  
9 July 6. On July 11, in response to an interrogatory, plaintiff stated that she had retained Expedia  
10 e-mail.

11 Meanwhile, in June of 2005, plaintiff delivered three laptop computers and an external  
12 hard drive to her counsel's offices. A member of plaintiff's counsel's IT department archived  
13 and copied certain files from the computers and hard drive, but counsel asserts that she did not  
14 begin to look at any e-mail at that time.

15 In early July of 2005, plaintiff's counsel began to sort the e-mail documents using certain  
16 keywords, in an attempt to screen out any potentially privileged communications. In mid-  
17 August, plaintiff's counsel hired a legal assistant to begin reviewing the e-mail in preparation for  
18 responding to defendants' discovery requests. She apparently was instructed to sort the e-mail  
19 using certain keywords and proper names, and to move potentially privileged e-mails to a  
20 separate folder that counsel would not review. She apparently conducted this sort from August  
21 23, 2005 to October 5, 2005. Plaintiff's counsel also obtained another attorney to assist with  
22 the sort. He conducted his portion of the sort from August 25, 2005 to September 13, 2005.

23 On August 24 and 30, plaintiff's counsel explained to defendants' counsel that there were  
24 over 30,000 e-mail communications that they were attempting to segregate. On September 1,  
25 2005, plaintiff apparently produced 4,200 e-mails to defendants. On October 6, 7 and 11,  
26 counsel again met to discuss the sorting and review process. Defendants assert that it was not



1 until the October discussions that they learned that plaintiff possesses tens of thousands of  
2 Expedia documents, an Expedia-issued laptop, and an Expedia-issued e-mail account.  
3 Defendants promptly demanded the return of the documents and computer, as well as plaintiff's  
4 two personal computers. Defendants also demanded that plaintiff, her counsel, and any other  
5 person to whom information had been disseminated relinquish possession of all copies of  
6 Expedia e-mail messages and other documents, and provide written declarations regarding their  
7 access of, use, and any further dissemination of these documents.

8 Plaintiff's counsel ultimately turned over plaintiff's two personal computers, along with  
9 numerous documents, computer disks and CDs, and four other computers, to an agreed upon  
10 forensics firm. However, defendants believe that plaintiff's counsel has retained copies of  
11 numerous other computer files and documents, including those that may contain privileged,  
12 confidential and proprietary documents. Accordingly, defendants filed a motion for temporary  
13 restraining order and preliminary injunction and motion to disqualify,<sup>1</sup> and noted depositions of  
14 plaintiff's counsel's IT representative and a representative of her law firm that is best able to  
15 answer questions about the sorting and review process. In response, plaintiff filed a motion to  
16 quash the deposition subpoenas, which this Court subsequently denied. A representative from  
17 plaintiff's counsel's IT department was deposed on January 5, 2006.

18 Defendants continue to assert that they have been unable to access and review their own  
19 documents due to plaintiff's refusal to cooperate, and her insufficient instructions to the forensic  
20 firm. Accordingly, they now seek this Court's intervention.

### 21 **B. Standard of Review for Preliminary Injunctions**

22 To obtain a preliminary injunction, defendants must demonstrate either: (1) probable  
23 success on the merits and the possibility of irreparable harm; or (2) that serious questions have  
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25 <sup>1</sup> Defendants have since withdrawn the portion of their motion asking for a temporary  
26 restraining order, believing it to be unnecessary, and ask only that the Court issue a preliminary  
injunction. (Dkt. #37).



1 been raised and the balance of hardships tips in their favor. *A&M Records, Inc. v. Napster, Inc.*,  
2 239 F.3d 1004, 1013 (9th Cir. 2001). The Ninth Circuit Court of Appeals has explained that  
3 each of these two prongs “requires an examination of both the potential merits of the asserted  
4 claims and the harm or hardships faced by the parties. We have held that ‘these two  
5 formulations represent two points on a sliding scale in which the required degree of irreparable  
6 harm increases as the probability of success decreases.’ Additionally, ‘in cases where the public  
7 interest is involved, the district court must also examine whether the public interest favors the  
8 plaintiff.’” *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 965 (9th Cir. 2002)  
9 (citations omitted).

10 Accordingly, the Court will discuss these elements in turn below.

11 1. Likelihood of Success on the Merits

12 Defendants have filed four counterclaims against plaintiff – misappropriation of trade  
13 secrets, conversion, breach of duty of loyalty, and breach of contract – and ultimately seek a  
14 permanent injunction requiring plaintiff to return all of defendants’ property. The Court will  
15 begin by addressing the breach of contract counterclaim.

16 Defendants assert that plaintiff’s employment contract expressly provides that plaintiff was  
17 prohibited from disclosing or using for any purpose other than in the course of her employment  
18 confidential or proprietary information or trade secrets. Her employment contract further  
19 provides that upon termination of her employment, she was required to return property and  
20 equipment belonging to the company, including her computer, e-mail and documents. Plaintiff’s  
21 contract further states that all materials, data and information stored on or transmitted by a  
22 company computer remains the property of defendants. Thus, defendants argue that plaintiff  
23 breached her contract by taking, and not immediately returning her computer and documents  
24 when her employment was terminated.

25 Plaintiff argues that, in the same employment contract, there is a provision that contains a  
26 requirement that she be informed in writing of any alleged breach of the agreement. Plaintiff



1 would then have 30 days to cure any breach. Plaintiff argues that defendants did not exercise  
2 that contract provision, and therefore, have waived their counterclaim. Plaintiff further argues  
3 that any breach has been cured by tender of all contested materials to Blank Law & Technology.  
4 Finally, plaintiff argues that disclosure of the documents and information to her counsel is not  
5 improper and does not constitute a breach. The Court is not persuaded.

6 In order to establish a breach of contract claim, a party must establish the existence of a  
7 contract, the breach of that contract by another party, and the damages incurred as a result of  
8 the breach. *Lehrer v. Dept. of Social and Health Serv.*, 101 Wn. App. 509, 516 (2000).

9 Defendants have produced a copy of plaintiff's employment agreement, and there is no dispute  
10 that she signed her agreement voluntarily. By so signing, she acknowledged that disclosure of  
11 defendants' documents to anyone for any reason is prohibited except for use by the employee in  
12 the course of her employment. Plaintiff violated that provision by providing more than 90,000  
13 documents to her attorneys both before and after her employment was terminated. Many of  
14 those documents contained confidential company information, and many of the documents were  
15 attorney-client privileged. Furthermore, many of the documents appear to have little or no  
16 relevance to plaintiff's employment discrimination claims.

17 Second, the contract explicitly requires plaintiff to return the company's property upon  
18 termination of her employment. That requirement is not conditioned on any other contract  
19 provision, such as the cure provision.

20 Finally, the Court is not persuaded that any breach has been cured by tendering the  
21 disputed documents to Blank & Associates. Even though the disputed property is now in place  
22 at a "neutral" forensic firm, the fact remains that people, other than defendants, have access to,  
23 and control over, documents and computers that never should have been provided by plaintiff to  
24 her counsel in the first place.

25 Accordingly, the Court finds that defendants have a high likelihood of success on the  
26 merits of this counterclaim, and that is enough to meet the first prong of the preliminary



1 injunction standard. Because the Court finds that a likelihood of success on this counterclaim  
2 satisfies the first prong of the preliminary injunction standard, it will not address the likelihood of  
3 success on defendants' remaining counterclaims.

4 2. Irreparable Harm

5 As for the issue of irreparable harm, the Court agrees with defendants that irreparable  
6 harm will continue if the documents are not returned to them. Allowing plaintiff and her counsel  
7 to continue to have access to the documents increases the risk that they will review privileged  
8 documents. Any documents to which plaintiff is entitled can be produced through the normal  
9 channels of discovery. There is also risk of spoliation of evidence if defendants are not allowed  
10 to receive all of their property back so that they may review all of the documents that were  
11 retained.

12 The Court is not persuaded that plaintiff will suffer any harm from the entry of a  
13 preliminary injunction in this case. For instance, plaintiff argues that if all of the property is  
14 transferred to defendants, there is a risk that a document could be accidentally deleted and that  
15 plaintiff may never be able to access it again. However, the Court reminds plaintiff that those  
16 risks are present in any litigation. Indeed, in the normal course of many litigations, there are  
17 instances where documents are destroyed or otherwise "lost" during the discovery period.  
18 Plaintiff has an advantage in this case. She has presumably seen all 90,000 plus documents that  
19 are at issue here. Thus, if her counsel now makes a discovery request for certain of those  
20 documents, and if defendants do not produce the documents claiming that they don't exist,  
21 plaintiff will be able to advise counsel that she has seen such documents and knows that they do  
22 exist and where they should be able to be located on the computer.

23 Accordingly, the Court finds that defendants have met the second prong of the preliminary  
24 injunction standard.

25 2. Bond

26 Because the Court will impose a preliminary injunction in this case, there is a need to



1 address the issue of defendants' posting of a bond. However, at the parties' request, the Court  
2 is reserving the bond issue until the parties have been able to discuss the scope of the preliminary  
3 injunction with Blank Law & Technology. The parties will then submit a proposed bond  
4 amount to this Court.

### 5 CONCLUSION

6 The Court, having considered defendants' Motion for Preliminary Injunction (Dkt. #67),  
7 plaintiffs' Response (Dkt. #72), defendants' Reply (Dkt. #78), the declarations in support and  
8 opposition thereto, the oral arguments presented on February 9, 2006 in this Court, and the  
9 remainder of the record, hereby finds and ORDERS:

10 (1) Defendants' Motion for a Preliminary Injunction (Dkt. #67) is GRANTED. The  
11 Court imposes the following injunctive relief:

12 a. Expedia's laptop and all Expedia documents ("Expedia property"), except for those  
13 documents produced through proper discovery thus far in the litigation, shall be returned to  
14 Expedia immediately, after Blank Law & Technology P.S. ("Blank") removes Ms. Henry's  
15 privileged documents, at her expense. For purposes of this Order, documents are determined to  
16 be Ms. Henry's privileged documents if they comprise the substance of messages that were sent  
17 or received by anyone at Schwerin Campbell Barnard LLP, anyone at Vedder Price Kaufman &  
18 Kammholz, anyone at Ahrens & DeAngeli, Suzanne Thomas, or Curt Chapman. If any of Ms.  
19 Henry's privileged documents attach or summarize Expedia documents, the attachment and/or  
20 summary shall be permanently removed, and Blank shall identify the offending document and  
21 certify to Expedia the permanent removal of same. As soon as possible after such production,  
22 Blank shall provide Expedia with a privilege log identifying all documents that are not produced  
23 to Expedia.<sup>2</sup>

24 b. Pending trial on the merits, Ms. Henry and her counsel are restrained from accessing or

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26 <sup>2</sup> In the event that Blank is unwilling or unable to perform any of the services ordered,  
Expedia shall arrange for another computer forensics firm to perform such services.



1 controlling access to any Expedia property, or documents derived therefrom, in the custody of  
2 Blank.

3 (2) Defendants shall post a security bond with this Court in an amount yet to be  
4 determined. The parties shall submit a proposed bond amount no later than five business days  
5 from the date of this Order. This preliminary injunction shall not become effective until the  
6 posting of such bond.

7 (3) The Clerk shall send a copy of this Order to all counsel of record.

8 DATED this 14 day of February 2006.

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12 RICARDO S. MARTINEZ  
13 UNITED STATES DISTRICT JUDGE  
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